RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
MAY 25 2011
OFFICE OF THE CLERK

No. 10-1311

In the Supreme Court of the United States

BLUE BELL CREAMERIES, LP,
Petitioner,

v.

RICHARD H. ROBERTS, Commissioner,
Department of Revenue, State of Tennessee,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Tennessee

RESPONDENT'S BRIEF IN OPPOSITION

ROBERT E. COOPER, JR.
Attorney General & Reporter
JOSEPH F. WHALEN
Associate Solicitor General
CHARLES L. LEWIS*
Deputy Attorney General
BRAD H. BUCHANAN
Assistant Attorney General
425 Fifth Avenue North
Nashville, Tennessee 37243
larry.lewis@ag.tn.gov
(615) 741-2968

**Counsel of Record*
Counsel for Respondent

May 25, 2011

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

Library of Congress
Law Library

QUESTION PRESENTED

Whether Tennessee is entitled, under the Commerce Clause and the Due Process Clause of the Fourteenth Amendment, to apportion and tax income paid to an operating subsidiary partnership by its holding company parent corporation when the two companies are part of a single, indivisible ice cream business.

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING REVIEW 4

I. THE TENNESSEE SUPREME COURT'S HOLDING IS IN PERFECT ACCORD WITH THIS COURT'S PRECEDENT 4

A. The Unitary Business Principle Was Developed to Identify the Scope of Businesses Whose Income is Apportionable Under the United States Constitution 4

B. The Unitary Business Principle is a Flexible Framework Designed to Bypass Formalities and Appraise the Fundamental Nature of a Business 6

C. The Tennessee Supreme Court Properly Directed Its Analysis to the Ultimate Question at the Heart of the Unitary Business Principle 8

D. The Decision Below is Consistent with *Woolworth* Because It Relies on More Than Just the Flow of Income to BBC USA 15

II. THIS CASE IS CONTROLLED BY PAST DECISIONS OF THIS COURT AND IS NOT NOVEL 16

CONCLUSION 18

TABLE OF AUTHORITIES

CASES	Page(s)
Allied-Signal, Inc. v. Director, Div. of Taxation, 504 U.S. 768 (1992)	5, 7, 8, 12, 17
Barclays Bank Plc v. Franchise Tax Bd., 512 U.S. 298 (1994)	7
Bass, Ratcliff & Gretton, Ltd. v. State Tax Comm'n, 266 U.S. 271 (1924)	11
Butler Brothers v. McColgan, 111 P.2d 334 (Cal. 1941), *aff'd*, 315 U.S. 501 (1942)	7, 11
Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159 (1983)	6, 7, 11, 14
Edison California Stores, Inc. v. McColgan, 183 P.2d 16 (Cal. 1947)	7
Exxon Corp. v. Dep't of Revenue, 447 U.S. 207 (1980)	5, 9, 10, 11, 13
F.W. Woolworth Co. v. Taxation & Revenue Dep't of N.M., 458 U.S. 354 (1982)	10, 11, 13, 15, 16
MeadWestvaco Corp. v. Ill. Dep't of Revenue, 553 U.S. 16 (2008)	*passim*
Mobil Oil Corp. v. Comm'r of Taxes of Vt., 445 U.S. 425 (1980)	*passim*

Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113 (1920) 11, 17

CONSTITUTION

U.S. Const., Art. I, § 8, cl. 3 ..... 3, 4

U.S. Const., Amend. XIV, § 1 ..... 3, 4

STATUTES

26 U.S.C. §§ 1361-79 2

28 U.S.C. § 1257(a) 1

Tenn. Code Ann. §§ 67-4-2001, et seq. 5

Tenn. Code Ann. § 67-4-2004(1) (2000 Supp.) 3

Tenn. Code Ann. § 67-4-2004(14) (2000 Supp.) 2

Tenn. Code Ann. § 67-4-2006(a)(1) (2000 Supp.) 2

Tenn. Code Ann. § 67-4-2011(c)(3) (2000 Supp.) 3

Tenn. Code Ann. § 67-4-2012 (2000 Supp.) 3

OPINIONS BELOW

The January 24, 2011, opinion of the Tennessee Supreme Court is published in the Southwest Reporter at 333 S.W.3d 59. (Pet.Apx. 1a). The September 29, 2009, opinion of the Tennessee Court of Appeals is unreported. (Pet.Apx. 28a). The January 5, 2009, "Final Order" of the Davidson County (Tennessee) Chancery Court is unreported. (Pet.Apx. 59a). The November 13, 2008, "Memorandum" of the Davidson County (Tennessee) Chancery Court is unreported. (Pet.Apx. 62a). The August 15, 2008, "Memorandum and Order" of the Davidson County (Tennessee) Chancery Court is unreported. (Pet.Apx. 86a).

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

Petitioner Blue Bell Creameries, LP ("Blue Bell"), is a limited partnership that produces, distributes, and sells ice cream in multiple states, including Tennessee. (Pet.Apx. 3a). Blue Bell's predecessor entity had two partner corporations that were wholly owned by Blue Bell Creameries, USA, Inc. ("BBC USA"), making BBC USA the ultimate parent company of Blue Bell. *See id.* at 3a-4a. "BBC USA existed only to own the assets and properties of the related businesses and legal entities that operated the Blue Bell ice cream business" with Blue Bell serving as the operating subsidiary for the ice cream business. (Pet.Apx. 4a). This structure was adopted to avoid the imposition of a Texas state tax on its income. *See id.*

In late 2000, BBC USA's predecessor corporation decided to reorganize to become an S corporation under 26 U.S.C. §§ 1361-79 and obtain pass-through federal tax treatment. (Pet.Apx 4a). This required a reorganization of the entire structure of entities, with each being replaced by a new version of the same entity that eventually took the same name and place in the corporate hierarchy. At the time of the reorganization, an S corporation could have no more than 75 shareholders. To meet this requirement, BBC USA arranged for 75 shareholders to remain direct owners while the excess shareholders were allowed to contribute their shares in BBC USA to Blue Bell in exchange for limited partnership interests in the operating subsidiary. (Pet.Apx. 4a-5a). These shares were contributed on January 1, 2001, and BBC USA then immediately redeemed the shares (Pet.Apx. 4a-5a), causing Blue Bell to recognize a capital gain of $119,909,317 for 2001.[1] (Pet.Apx. 6a).

Blue Bell reported the capital gain from the redemption as non-business earnings under Tenn. Code Ann. § 67-4-2004(14) (2000 Supp.). (Pet.Apx. 6a). Non-business earnings are allocated to the taxpayer's

---

[1] Petitioner states that "all of the gain from the stock redemption was allocated to shareholders of holding company BBC USA." (Pet. 3). This is not correct. Blue Bell *itself* recognized the gain and reported the capital gains on its own 2001 federal income tax return. (Pet.Apx. 6a). Federally reported income is the starting point for Tennessee's calculation of taxable corporate income. *See* Tenn. Code Ann. § 67-4-2006(a)(1) (2000 Supp.). Similarly, Petitioner's claim that "BBC USA's stock redemption transaction ... benefitted the holding company's out-of-state shareholders" (Pet. 13) is incorrect. Again, Blue Bell *itself* reported this capital gain to the federal government.

domicile, which in this case was not Tennessee. *See* Tenn. Code Ann. § 67-4-2011(c)(3) (2000 Supp.). The Tennessee Department of Revenue classified the capital gain as business earnings under Tenn. Code Ann. § 67-4-2004(1) (2000 Supp.). A share of a taxpayer's business earnings are apportioned to Tennessee under Tenn. Code Ann. § 67-4-2012 (2000 Supp.) according to a formula designed to measure the share of the taxpayer's business done in Tennessee. *See id.*

Blue Bell filed suit in the Davidson County (Tennessee) Chancery Court, seeking a refund of taxes paid on the grounds that the capital gain was non-business earnings under Tennessee's statute and beyond Tennessee's taxing power under the Commerce Clause and the Due Process Clause of the Fourteenth Amendment. The Chancellor granted summary judgment to Blue Bell on the constitutional grounds; the Tennessee Court of Appeals affirmed this ruling. The Tennessee Supreme Court granted the Commissioner of Revenue permission to appeal, heard arguments on June 3, 2010, and issued a unanimous opinion on January 24, 2011, reversing the decisions below. The Tennessee Supreme Court found that the redemption income was properly characterized as business earnings under the statute.[2] It also held that the imposition of the tax was constitutional on two independent grounds – because the income-producing assets (the shares of BBC USA briefly held by Blue Bell) served an operational function in the taxpayer's

---

[2] (Pet.Apx. 17a). Petitioner correctly states that this is an issue of state law for which it does not seek review. (Pet. 3, n.1).

business and because both entities were a part of the same unitary ice cream business.

REASONS FOR DENYING REVIEW

I. THE TENNESSEE SUPREME COURT'S HOLDING IS IN PERFECT ACCORD WITH THIS COURT'S PRECEDENT.

Contrary to Petitioner's assertions, the Tennessee Supreme Court decision correctly follows "longstanding precedent from this Court requiring [a] ... factual analysis of the nexus between the taxing state and the person, property or activity it seeks to tax." (Pet. 6). In criticizing the lower court's decision, Petitioner has made the mistake of neglecting not only this Court's admonitions that the unitary business principle is to be applied flexibly rather than restrictively, but also the fundamental purpose of the principle. All of the unitary business tests – the "hallmarks," the three unities, the contribution and dependence test, and any others – are designed to answer a single fundamental question: what is the scope of the business being conducted? The Tennessee Supreme Court answered that question in accord with this Court's decisions.

A. The Unitary Business Principle Was Developed to Identify the Scope of Businesses Whose Income is Apportionable Under the United States Constitution.

The Commerce Clause and the Due Process Clause of the Fourteenth Amendment permit a state to tax only that portion of a multistate business's income earned within its borders. But as businesses became

more and more complex, it became more difficult to allocate particular income to a single state. Because of this complexity, this Court has endorsed a practice called formulary apportionment. Under this approach, a taxing state with which the business has nexus identifies the taxpayer's total multistate income. The state then applies an apportionment formula to the total income of the multistate business and arrives at its fair share of that total. *See Exxon Corp. v. Dep't of Revenue*, 447 U.S. 207, 223 (1980). The state may then tax that share, as Tennessee does under its excise tax (codified at Tenn. Code Ann. §§ 67-4-2001, *et seq.*).

To determine what income is properly included within the apportionable multistate tax base, this Court has "developed the unitary business principle. Under that principle, a State need not 'isolate the intrastate income-producing activities from the rest of the business' but 'may tax an apportioned sum of the corporation's multistate business if the business is unitary.'" *MeadWestvaco Corp. v. Ill. Dep't of Revenue*, 553 U.S. 16, 25 (2008) (quoting *Allied-Signal, Inc. v. Director, Div. of Taxation*, 504 U.S. 768, 772 (1992). The unitary business principle is thus the "linchpin of apportionability," *Mobil Oil Corp. v. Comm'r of Taxes of Vt.*, 445 U.S. 425, 439 (1980), and the means by which courts determine the scope of the business being conducted in the taxing state.

Under the unitary business principle, a "court must determine whether 'intrastate and extrastate activities formed part of a single unitary business,' or whether the out-of-state values that the State seeks to tax 'derive[d] from "unrelated business activity" which constitutes a "discrete business enterprise."'" *MeadWestvaco*, 553 U.S. at 25. Thus, a unitary

business is simply an indivisible enterprise that cannot be broken into smaller units conducting separate businesses. The concept ignores artificial and technical corporate structures and instead takes a practical view of entities that, in reality, function as and comprise one business, characterized by a single management, unified goals, and a flow of value among the parts of the business. The principle thus "shift[s] the constitutional inquiry from the niceties of geographic accounting to the determination of the taxpayer's business unit." *Id.* at 26. The fundamental inquiry, then, is the scope of the business unit to which the state tax is being applied. All of the income recognized by that unit is apportionable to any state in which the unit does business, and "the taxpayer always has the 'distinct burden of showing by 'clear and cogent evidence' that [the state tax] results in extraterritorial values being taxed.'" *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 175 (1983).

B. The Unitary Business Principle is a Flexible Framework Designed to Bypass Formalities and Appraise the Fundamental Nature of a Business.

This Court, along with the state courts that have addressed questions of unity, have developed several tests for determining when entities are unitary. One test looks to the three factors that this Court has dubbed the "'hallmarks' of a unitary relationship" – "functional integration, centralized management, and economies of scale." *MeadWestvaco*, 553 U.S. at 30. Under the contribution and dependence test, "[i]f the operation of the portion of the business done within the state is dependent upon or contributes to the operation of the business without the state, the

operations are unitary." *Edison California Stores, Inc. v. McColgan*, 183 P.2d 16, 21 (Cal. 1947). The three unities test looks to the unities of ownership, operations, and centralized executive force. *Butler Brothers v. McColgan*, 111 P.2d 334, 341 (Cal. 1941), *aff'd*, 315 U.S. 501 (1942).[3]

The existence of these varied approaches is a testament to the flexibility of the unitary business analysis. This Court has made clear that "the unitary business concept ... is not, so to speak, unitary: there are variations on the theme, and any number of them are logically consistent with the underlying principles motivating the approach." *Container*, 463 U.S. at 167. Thus, "the unitary business principle is not so inflexible that as new methods of finance and new forms of business evolve it cannot be modified or supplemented where appropriate." *Allied-Signal*, 504 U.S. at 786. The unitary business principle was developed to liberate states from the strictures of separate accounting in determining the taxability of corporate income; thus, rigidly adhering to any particular analytical tool runs counter to the purpose for adopting the principle in the first place. Rather, the principle requires a flexible approach in which the ultimate goal – determining the extent of the relevant business unit – is kept at the forefront of the inquiry.

---

[3] Although these tests were initially developed in the California state courts, they have been recognized by this Court as legitimate analytical approaches to the unitary business question. *See Barclays Bank Plc v. Franchise Tax Bd.*, 512 U.S. 298, 304 n.1 (1994).

Two key analytical features of the principle bear special mention here. First, this Court has made clear that "intercorporate division" does not bear on the unitary business analysis because "the form of business organization may have nothing to do with the underlying unity or diversity of business enterprise." *Mobil*, 445 U.S. at 440. A unitary business may therefore be one that crosses multiple corporate lines of division. Second, "the existence of a unitary relation between the payor and the payee is one means of meeting the constitutional requirement" for apportionment. *Allied-Signal*, 504 U.S. at 787. As a result, under this Court's precedent, if there is a unitary relationship between BBC USA (the payor of the stock redemption income at issue here) and Blue Bell (the payee), then Tennessee is constitutionally permitted to tax an apportioned share of the income, regardless of the corporate divisions.

C. The Tennessee Supreme Court Properly Directed Its Analysis to the Ultimate Question at the Heart of the Unitary Business Principle.

There is no constitutional question that Tennessee may apply its excise tax (a corporate income tax) to the income of Blue Bell. Blue Bell "produces, distributes, and sells ice cream in the state of Tennessee." (Pet. 3). There is thus no dispute that Blue Bell, as an entity, has nexus with Tennessee. "Where, as here, there is no dispute that the taxpayer has done some business in the taxing State, the inquiry shifts from whether the State may tax to what it may tax." *MeadWestvaco*, 553 U.S. at 25. The unitary business principle provides the answer to that question.

"Because both entities derive their income from a single underlying activity," the Tennessee Supreme Court "h[e]ld that BBC USA is unitary with Taxpayer's Blue Bell ice cream business." (Pet.Apx. 23a). Although it criticizes what it calls the "'single underlying activity' analysis" (Pet. 11), Petitioner never denies (nor can it) that there *is* only one, single underlying activity present here. That being the case, it is inescapable that Blue Bell and BBC USA are part of the same unitary business. As this Court stated in *MeadWestvaco*, the operative question is "whether 'intrastate and extrastate activities formed part of a *single* unitary business." *MeadWestvaco*, 553 U.S. at 25 (emphasis added). If there is a *single* underlying activity then, logically, there can only be a *single* business unit.[4]

In reaching its holding that Blue Bell and BBC USA were part of the same unitary business, the Tennessee Supreme Court relied on this Court's decisions in *Mobil* and *Exxon*, explaining:

> To determine whether two separate business entities form a unitary business, we must look beyond the superficial divisions between parent corporations and their subsidiaries to the "underlying activity" generating the income. *See Mobil Oil Corp. v. Comm'r of Taxes*, 445 U.S. 425, 440–41 (1980). To be an unrelated business

[4] This is not to suggest that the number of unitary businesses tracks the number of "underlying activities." A unitary business may have more than one underlying activity if the activities are sufficiently integrated, centrally managed, and produce economies of scale. But if there is only a *single* underlying activity, it defies logic to suggest that more than a single business is present.

> activity, the separate business entity must constitute a "discrete business enterprise" from the taxpayer. *Exxon Corp.*, 447 U.S. at 223–24.

(Pet.Apx. 22a). Specifically, the *Mobil* Court said that "[o]ne must look principally at the underlying activity, not at the form of investment, to determine the propriety of apportionability." *Mobil*, 445 U.S. at 440. That is precisely what the Tennessee Supreme Court did. It looked at the underlying activity, saw that there was only one business activity among these companies – making and selling ice cream – and drew the *unavoidable* conclusion that this was a single ice cream business broken into multiple entities. Indeed, it relied in part for this holding on the testimony of the Chief Financial Officer of Petitioner's general partner that "characterized BBC USA and BBC USA's subsidiaries as part of the singular ice cream business and characterized the stockholders of BBC USA as investors in the ice cream business." (Pet.Apx. 23a). Petitioner's own witness's testimony amounts to an explicit admission that these companies formed a single, indivisible business unit.

The Tennessee Supreme Court's observation that the traditional "tests are ill-suited for assessing Taxpayer and BBC USA's relationship" is unremarkable given the facts of this case. (Pet.Apx. 24a). As the court stated, "all three tests require a comparison of the relationship of the separate business entities' business operations," but these tests were developed in cases like *Mobil* and *F.W. Woolworth Co. v. Taxation & Revenue Dep't of N.M.*, 458 U.S. 354 (1982), in which both the taxpayer and its affiliates had their *own* operations. In the earliest cases, the principle was applied to allow the apportionment of

"vertically-integrated business[es] whose various components (manufacturing, sales, etc.) operated in different States," as well as of "a series of similar enterprises operating separately in various jurisdictions but linked." *Container*, 463 U.S. at 166.[5] The question in that sort of case is invariably the level of connectivity between operations.

The fact pattern here is different – the operations are all housed within Blue Bell itself. That is why the tests applied in *Mobil*, *Exxon*, and *Woolworth* are "ill-suited" to this pure-holding-company fact pattern and why, rather than becoming bogged down in applying factually disparate precedents, the Tennessee Supreme Court instead used the fundamental concepts laid down in *Mobil* and other cases to reach its conclusion.[6] As a result, the Tennessee Supreme Court's "single underlying activity analysis" was not used as a *replacement* for the governing tests and principles articulated by this Court, but rather was used to *implement* the unitary business principle in a

---

[5] These earlier cases cited include *Underwood Typewriter Co. v. Chamberlain*, 204 U.S. 113 (1920) (vertical integration), *Bass, Ratcliff & Gretton, Ltd. v. State Tax Comm'n*, 266 U.S. 271 (1924) (vertical integration), and *Butler Bros. v. McColgan*, 315 U.S. 501 (1942) (series of similar enterprises).

[6] Petitioner cannot seem to make up its mind as to whether this was appropriate. At one point it chastises the Tennessee Supreme Court for "summarily reject[ing]" the "well-established tests." (Pet. 10). Later, however, it acknowledges that "[a] straight application of the 'hallmarks of unity,' for example, may not present a precise fit with a non-operating holding company." (Pet. 14-15). That is exactly why the Tennessee Supreme Court looked beyond any single test and addressed the fundamental question at the heart of the unitary business principle.

factual setting not presented in this Court's previous unitary cases. The court below did as it was directed by this Court's past cases; it looked to the "underlying activity" (*Mobil*, 445 U.S. at 440) and found a "single" (*MeadWestvaco*, 553 U.S. at 25) line of business. It did as Petitioner now demands and "examined whether BBC USA's reorganization[7] and stock redemption transaction provided any value or concrete business advantages to Blue Bell in its production, sale and distribution of ice cream" (Pet. 13) when it determined that "the Stock Transaction and reorganization served to increase net gain from the ice cream business." (Pet.Apx. 21a).[8] The unitary business principle is, as this Court explained in *Allied-Signal*, a general and flexible concept. *See* 504 U.S. at 786. It does not require any particular test, and it is perfectly adaptable to the facts presented here. The Tennessee Supreme Court kept its focus firmly and properly on

---

[7] Petitioner's focus on *BBC USA's* reorganization is misleading. The *entire* corporate structure, including BBC USA and Blue Bell and each of their predecessors, was part of the centrally-planned and directed reorganization. *See* Pet.Apx. 4a-5a. This itself is a powerful indicator of unity between the two companies.

[8] Petitioner's claim that the Tennessee Supreme Court found that the reorganization and redemption "did not affect Blue Bell's production, sale and distribution of ice cream" (Pet. 17) is thus contrary to the opinion below. The Tennessee Supreme Court's determination that "the Stock Transaction neither diversified the business nor reduced risks associated with the ice cream business," and that "the Stock Transaction and Reorganization served to increase net gain from the ice cream business" led directly to its conclusion that the function of the reorganization and redemption was operational, rather than investment. (Pet.Apx. 21a).

the fundamental concept animating the unitary business principle.

Petitioner confuses the means with the ends when it insists on a rigid application of tests that were originally designed and applied in different factual contexts and when it accuses the Tennessee Supreme Court of treating it "differently than a fully functional operating parent company." (Pet. 20). The real difference between this case and those that have previously come before this Court is the facts. The "in-depth factual analysis" insisted upon by Petitioner (Pet. 6) would actually require "in-depth" facts. In *Exxon*, for example, this Court examined a complex and vertically integrated corporate structure in which each part performed various functions. *See Exxon*, 447 U.S. at 224-25. In *Woolworth*, the Court went to great lengths to examine the operations and relationships of the various Woolworth companies. *See Woolworth*, 458 U.S. at 364-69.

In the present case, the Tennessee Supreme Court was not faced with unitary fact patterns as complicated as those in *Exxon* or *Woolworth*. Because BBC USA had no operations of its own, it was not necessary to exhaustively examine the connectedness of operations as this Court did in *Woolworth*. Indeed, the Tennessee Supreme Court's factual analysis was commensurate with the complexity of the facts involved. Not every unity question is necessarily difficult. When it is obvious that the entities at issue are part of the same unitary business and common sense will countenance no other result, there is no need to rigidly apply tests that even Petitioner acknowledges were not developed with this fact pattern in mind. *See* Pet. 14-15. The Tennessee

Supreme Court simply recognized that the goal of the unitary business principle is not to identify whether there is functional integration, unity of operations, or dependence, in and of themselves; rather, these factors are merely means to the end of determining the scope of the business at issue. After all, "'[s]ubstantial mutual interdependence' can arise in any number of ways." *Container*, 463 U.S. at 179. When there is only one business that can be articulated from the bare facts present, there is no need for any further analysis.[9]

---

[9] Specifically, this is a finding of "enterprise unity" – the idea that BBC USA and Blue Bell are part of the same business unit. The Tennessee Supreme Court also conducted an operational function analysis focused on the use of the income-producing assets (the BBC USA shares). *See* Pet.Apx. 20a-22a. Petitioner frequently conflates the operational function and the enterprise unity analyses. For instance, in discussing the operational function analysis, it cites a reference in *Container* to "a parent's 'contributions to income' to a subsidiary." (Pet. 18). But the cited passage in *Container* is explaining that "a relevant question in the unitary business inquiry is whether 'contributions to income [of the subsidiaries] result[ed] from functional integration, centralization of management, and economies of scale.'" *Container*, 463 U.S. at 179. Those, of course, are the "'hallmarks' of a unitary relationship," which relate to the concept of enterprise unity. *See MeadWestvaco*, 553 U.S. at 30. By contrast, "[t]he concept of operational function simply recognizes that an asset can be a part of a taxpayer's unitary business even if what we may term a 'unitary relationship' does *not* exist between the 'payor and payee.'" *Id.* (emphasis added).

D. The Decision Below is Consistent with *Woolworth* Because It Relies on More Than Just the Flow of Income to BBC USA.

In addition to its criticisms about the proper tests, Petitioner claims that the Tennessee Supreme Court erred by relying on the disfavored "adding to the riches" approach rejected by this Court, but it has misapprehended the holding below. In *Woolworth*, the New Mexico Supreme Court erred in holding that the taxpayer was unitary with its foreign affiliates. This Court pointed out that "[t]he state court's reasoning would trivialize th[e] due process limitation by holding it satisfied if the income in question 'adds to the riches of the corporation.'" *Woolworth*, 458 U.S. at 363. Thus, income must do more than simply accrete to the taxpayer to be considered part of its unitary business. Petitioner claims that the Tennessee Supreme Court has made the same error, seeming to link the lower court's focus on the single underlying activity with the illegitimate "adding to the riches" approach of the New Mexico Supreme Court in *Woolworth*. *See* Pet. 11-12. This is an unfounded leap of logic and betrays a serious misunderstanding of the decision below.

Blue Bell and BBC USA are not unitary simply because BBC USA receives money from Blue Bell. They are unitary because BBC USA has no reason to *exist* in the first place but to own the Blue Bell ice cream business. They are unitary because, without the income from the ice cream business, BBC USA would have no purpose of its own and would have no income with which to function. Petitioner fears that, under the holding below, "the mere fact that the operating subsidiary provides income to the pure holding company parent would end a court's analysis."

(Pet. 17). That is not so. *Woolworth* already stands as a bulwark against the argument that contribution of income alone establishes unity. Here, *all* of BBC USA's income came from the ice cream business and it could not survive without that income.

To hold that BBC USA was not a part of the unitary business that provided its very life's blood would be to turn the principle on its head. The Tennessee Supreme Court simply recognized that when there is no more than one business evident in the facts, there cannot be more than one unitary business for constitutional purposes. This conclusion is inescapable under this Court's jurisprudence.

II. THIS CASE IS CONTROLLED BY PAST DECISIONS OF THIS COURT AND IS NOT NOVEL.

This Court's prior holdings control the outcome of this case even if the facts are different; this case thus presents no "significant issue" that needs to be settled by this Court. (Pet. 19). While Petitioner is correct that none of this Court's unitary cases involved a "pure" holding company, the fundamental concepts undergirding the unitary business principle apply with equal force and control this case. BBC USA and Blue Bell are separate companies, but that fact is irrelevant for the unitary analysis. *See Mobil*, 445 U.S. at 440. This Court has previously held that a "holding company function" does not constitute a discrete business, finding that this argument devolved into drawing lines based upon corporate division, an artifice rejected by the unitary business principle. *Id.* Under *Mobil*, because BBC USA does nothing but hold other companies, it is not conducting a business

separate and discrete from that of Blue Bell. As a result, it is by process of elimination a part of the only business actually present here, the ice cream business. This Court has said that when the payor and payee of income are part of the same unitary business, it is constitutionally apportionable, *see Allied-Signal*, 504 U.S. at 787, and that is the case here.

These black letter principles control the outcome here. The Court's unitary jurisprudence is conceptually flexible enough to deal easily with new fact situations, even if they are different from those cases previously adjudicated by this Court. Indeed, it is this virtue of the unitary business principle that has enabled the state courts to determine hundreds of unitary cases over the years without the need for this Court to place its imprimatur upon each new fact pattern as it arises.[10]

---

[10] Similarly, the Tennessee Supreme Court has not purported to announce a "*per se* rule that all non-operating holding companies are unitary with their operating subsidiaries" or any other kind of bright-line test. (Pet. 16). It is, of course, not within the lower court's authority to pronounce any such rule, nor did it pretend to do so. It adjudicated the case on the facts before it and "ha[d] no occasion to consider whether the rule prescribed, if applied under different conditions, might be obnoxious to the Constitution." *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113, 121 (1920). The precedential ramifications of this decision in Tennessee are no more expansive than any other case construed in the common law tradition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully Submitted,

ROBERT E. COOPER, JR.
Attorney General & Reporter

JOSEPH F. WHALEN
Associate Solicitor General

CHARLES L. LEWIS*
Deputy Attorney General

BRAD H. BUCHANAN
Assistant Attorney General
425 Fifth Avenue North
Nashville, Tennessee 37243
larry.lewis@ag.tn.gov
(615) 741-2968
* *Counsel of Record*

Counsel for Respondent